

BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET FD 35557

REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS

ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
REPLY IN SUPPORT OF APPEAL OF WCTL MEMBER
ORGANIZATIONS TO FEBRUARY 27, 2012
DECISION BY THE DIRECTOR, OFFICE OF PROCEEDINGS

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Public Record

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Dated: March 6, 2012

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Arkansas Electric Cooperative Corporation (AECC) supports the appeal by the member organizations (Member Organizations) of the Western Coal Traffic League (WCTL) from the February 27, 2012 Decision by the Director of the Office of Proceedings. AECC endorses the arguments made by the Member Organizations in their appeal, but will not repeat them.

The discovery that BNSF Railway Company (BNSF) has directed to the Member Organizations would not further the purpose of this proceeding. Through the subpoenas to the Member Organizations, BNSF is seeking information about what actions these organizations have taken to suppress coal dust ("whether You have caused a Topper Agent to be applied", "whether You have caused a method of suppressing coal dust, other than a Topper Agent or Load Profiling, to be applied", "describe arrangements that You have made", etc.). This proceeding is not about what actions coal shippers have, or have not, taken to comply with BNSF's Tariff. This proceeding is

about whether BNSF's Tariff, and in particular its "safe harbor" provision, is an unreasonable practice prohibited by 49 U.S.C. § 10702.

In developing its Tariff, BNSF elected not to collaborate with shippers, although the Board "expect[ed]" it to do so. Arkansas Electric Cooperative Corporation, FD 35305, Decision served Mar. 3, 2011, at 14. BNSF presumably has the tests, studies, measurements, data, and other information on which it based the Tariff, and it can defend it (or attempt to do so) on the basis of those tests and studies. BNSF has made no showing that, to defend its own Tariff, it requires information from non-parties to this proceeding that were not involved in the development of the Tariff.

Discovery against a party may be justified on the ground that a litigant is entitled to inquire about the facts that its adversary will present at trial. BNSF has obtained discovery from WCTL, a party that will present evidence in this proceeding, about facts and documents in WCTL's possession. ^{1/} Similarly, as a party, WCTL has the right to obtain discovery of facts and documents in BNSF's possession. But the Member Organizations are not parties and so will be presenting no evidence, and they have no right to obtain discovery from BNSF.

Therefore, the discovery that BNSF is seeking against non-parties would not serve any legitimate purpose in this proceeding. This discovery would, however, impose a substantial burden and expense on organizations that have chosen not to participate as parties in this proceeding, have chosen not to present evidence, have

^{1/} BNSF has also obtained discovery from AECC about facts and documents in AECC's possession. AECC's attempts to obtain discovery from BNSF are the subject of a motion to compel.

chosen not to seek discovery from BNSF. Allowing BNSF to impose such a burden on non-parties – as the Board would do if it sustained the Director's Order – would establish a precedent that would discourage trade associations and like organizations from participating in Board proceedings for fear that their members would be subjected to expensive discovery obligations. 2/

Therefore, AECC supports WCTL's appeal and urges the Board to reverse the Director's decision authorizing discovery against non-party members of WCTL.

Respectfully submitted,

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2/ Discovery about compliance or non-compliance with BNSF's Tariff would be particularly chilling, in that BNSF will ultimately impose sanctions – that nature of which is now unknown – on non-compliant shippers.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March 2012, I caused a copy of the foregoing to be served electronically on all parties of record on the service list in this action.



Eric Von Salzen